

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Promoting Efficient Use of Spectrum Through)	WT Docket No. 00-230
Elimination of Barriers to the Development of)	
Secondary Markets)	

PETITION FOR PARTIAL RECONSIDERATION
OF THE
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION

The National Telecommunications Cooperative Association (NTCA)¹ hereby petitions the Commission to reconsider portions of the above-referenced Report and Order² (Secondary Markets Order). Specifically, NTCA requests that the Commission provide licensees with a safe harbor to protect against secondary liability, and revise its policies affording a lessee no rights if a licensee goes out of business due to bankruptcy, and requiring a licensee to “take all legal means necessary” to force lessee compliance with lease terms and FCC rules.

I. INTRODUCTION

First and foremost, NTCA applauds the Commission’s efforts in this proceeding. NTCA has stated time and again that small carriers with ties to rural communities need access to spectrum in order to facilitate the roll-out of wireless based service to rural

¹ NTCA is a not-for-profit association established in 1954. It represents more than 500 rate-of-return regulated rural telecommunications companies. NTCA members are full service telecommunications carriers providing local, wireless, cable, Internet, satellite and long distance services to their communities. All NTCA members are small carriers that are defined as “rural telephone companies” in the Telecommunications Act of 1996.

America. While NTCA emphasizes that primary spectrum opportunities for rural telephone companies are still necessary and required under Section 309(j) of the Communications Act of 1934, as amended, secondary markets pose a useful tool for rural deployment efforts.³ It is hoped that with some minor changes to the rules adopted in the Secondary Markets Order, more small businesses and carriers with ties to rural communities will gain access to spectrum.

II. A SPECTRUM LICENSEE SHOULD NOT BE HELD LIABLE FOR THE ACTS OF ITS LESSEE IF IT ABIDES BY SOME BASIC GUIDELINES

The Commission's described *de facto* leasing arrangement has the potential to put unused spectrum into the hands of rural telephone companies and others with the desire and incentive to provide service to rural America. However, the Commission's policy requiring licensees to retain secondary responsibility for operations serves as a disincentive for carriers to part with spectrum. The risk of liability may be too great. To stimulate the secondary markets the Commission should adopt a safe harbor protecting licensees from liability if the lease agreement contains certain covenants.

The Commission requires that a licensee have a "reasonable degree of actual knowledge about the lessee's activities." This requirement is unnecessarily vague. A large carrier with leased spectrum has no way of knowing how much care it must take in ensuring that its long-term lessee is in complete compliance with applicable laws and rules. It does not know if it must conduct surprise inspections, if it must review the

² In the Matter of Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, Report and Order, WT Docket No. 00-230 (rel. October 6, 2003).

³ NTCA cautions against the Commission relying on secondary markets as the wireless "cure" for rural America. Despite the Commission's actions and best intentions, there is no guarantee that large carriers will be willing to part with spectrum, even if currently unused. It is imperative that spectrum leasing be

lessee's written records and filings, and whether if it does not, if it is subjecting its self to liability. The rules stunt a carrier's willingness to part with spectrum.

The Commission should encourage carriers to part with spectrum on a long-term basis by making the risks and burdens involved minimal. Rather than vague liability provisions, the Commission should adopt a safe harbor. A licensee should be permitted to avoid liability by putting conditions or covenants in the lease requiring the lessee to comply with applicable laws and rules and making it clear that the lessee will be subject to FCC enforcement action if it fails to do so.

III. A LONG-TERM LESSEE SHOULD RETAIN SOME RIGHTS IF THE LICENSEE GOES BANKRUPT

Currently, if a licensee goes out of business due to bankruptcy, the lessee will be forced to cease operations and shut down. This lack of protection for spectrum lessees creates a disincentive for long-term spectrum leasing. As the Commission well knows, there is substantial investment involved in building and running a wireless operation. Carriers and investors are already leery given the bankruptcies by major telecommunications carriers and various corporate scandals over the past several years. Under the Commission's current rules, an innocent lessee's time, money and effort could be lost due to circumstances completely beyond its control. NTCA urges the Commission to remove this investment disincentive.

Rather than requiring complete forfeiture of spectrum leased from a bankrupt carrier, the Commission should permit lessees to continue operations and take over as primary licensee of the spectrum it uses. Alternatively, the lessee could be permitted to

considered in conjunction with primary spectrum opportunities as tools for bringing spectrum based

gradually transition its operations to other available spectrum. The lessee is thus guaranteed some measure of stability and continued ability to operate as it invests in and builds out a system. The public is also served by the continued operation of a wireless service upon which it relies.

IV. THE FCC TAKE AN ACTIVE ROLE IN ENFORCING RULES AGAINST SPECTRUM LESSEES AND BE FLEXIBLE IN ITS DEALINGS WITH LICENSEES

The Commission requires that a licensee ‘take all legal means necessary’ to make a lessee comply with its lease and the FCC rules. Potentially, a licensee could go to court to force a lessee to refrain from violating FCC rules or to comply with them. Similarly, the licensee could sue the lessee for failing to build out its territory as promised. However, going to court is expensive and it does nothing to help the licensee if the license is in jeopardy because of a lessee’s act or failure to act. This is another example of a policy that will serve to discourage spectrum leasing.

Rather than placing the entire burden on the shoulders of the licensee, the Commission should take a role in enforcing its own policies and rules. The Commission has the power and authority to order a lessee to cease and desist operations, it may fine the lessee or threaten criminal sanctions. The Commission may also adopt a policy of leniency if a licensee can show that it will fail to meet a construction deadline as a result of its good faith reliance on a spectrum lessee. The Commission should require that spectrum leases require compliance with its rules, but the burden on the licensee should be reasonable and the Commission must be the ultimate enforcer of those rules.

services to consumers living and working in rural areas.

V. CONCLUSION

NTCA is excited that the Commission is considering new and innovative ways to put spectrum into the hands of those that will provide services to rural America. However, many provisions of the Secondary Markets Order will serve to hinder the leasing of spectrum. Rather than putting roadblocks in the way of success, the Commission should revise its rules and policies to make spectrum leasing a viable option for all carriers.

Respectfully submitted,

NATIONAL TELECOMMUNICATIONS
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December 29, 2003

CERTIFICATE OF SERVICE

I, Rita H. Bolden, certify that a copy of the foregoing Petition for Reconsideration of the National Telecommunications Cooperative Association in WT Docket No. 00-230, FCC 03-113 was served on this 29th day of December 2003 by first-class, U.S. Mail, postage prepaid, to the following persons.

/s/ Rita H. Bolden

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